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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 535

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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United Brotherhood of Carpenters and Joiners of America prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 6, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (*infra*, pp. 5a-10a). The original decision and order of the National Labor Relations Board are reported at 130 NLRB 307 (R. 112-120, 76-94, *infra*,

pp. 11a-52a), and its supplemental decision and order are reported at 133 NLRB 358 (R. 121-125, *infra*, pp. 54a-59a).

JURISDICTION

The decree of the Court of Appeals was entered on August 6, 1963 (*infra*, pp. 1a-4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board is empowered to order a labor organization to publish in its monthly journal circulated among its 750,000 members a notice that it will not engage in an unfair labor practice where (1) the unfair labor practice upon which the notice is based was terminated eight months before the complaint issued, (2) the termination took place in circumstances of contemporary widespread publicity, (3) virtually none of the 750,000 members among whom the notice is circulated felt any effect of the unfair labor practice which requires dissipation, and (4) the notice can be expected to mislead the 750,000 members into mistakenly believing that the agreements under which they are currently working are unlawful.

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), empowers the Board, upon a finding that an unfair labor practice has been committed, to enter an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ."

STATEMENT

Refinery Engineering Company is in the business of designing and constructing refinery units, chemical plants, and other heavy industrial structures (R. 77, G. C. ex. 8, p. 3). Beginning in 1957, it was engaged in the construction of an oil refinery plant at Laurel, Montana, near Billings (R. 77).

On May 4, 1956, the Company had entered into an agreement with petitioner United Brotherhood "to recognize the jurisdiction claims of the United Brotherhood of Carpenters and Joiners of America, to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners" (R. 74). The by-laws and trade rules of Billings Local 1172 of United Brotherhood adopted on November 9, 1954 (R. 22), together with a two-year agreement that local had entered into on March 14, 1956 with an employer group representing building contractors in or near Billings (R. 24, 77), had restricted employment to union members (R. 80).

On August 20, 1958, United Brotherhood and the Company entered into a new agreement which superseded the old, and the legality of the new agreement is unquestioned (R. 75, 78, *infra*, pp. 8a, 15a). Furthermore, on May 21, 1958, Billings Local 1172 and the employer group entered into a new collective bargaining agreement which eliminated the restriction on employment to union members (R. 31, 32-33). Finally, revised on February 25, 1958 and approved on November 3, 1958, the local union also amended its by-laws and trade rules to delete the former requirement that

"a non-union man [who] comes on the job may be permitted to work providing he gives a cash guarantee that he will join the Local Union" (R. 23).

Entry into the new agreement between United Brotherhood and the Company and supersedure of the old occurred in the following circumstances: On February 7, 1958, the then General Counsel of the Board wrote to the President of the Building and Construction Trades Department, AFL-CIO, informing him that, unless "illegal hiring arrangements" were corrected by June 1, 1958, refund of union dues and initiation fees would be sought as a consequence of the continuance of the arrangement (R. 86-87). Thereafter, the moratorium for application of the refund remedy was extended to November 1, 1958, for those employers and unions who were actively engaged in reformulating their hiring practices before September 1, 1958 (R. 87-88).[1] This moratorium period was "widely publicized" (R. 115, 90, *infra*, pp. 47a, 36a); in the words of the Company's Industrial Relations Director, "we, like everyone in the construction industry, were cognizant of the opinion handed down by the General Counsel . . ." (G. C. ex. 8, p. 21).

On April 21, 1958, after announcement of the General Counsel's policy, the Company's Industrial Relations Director wrote to the President of United Brotherhood (G.C. ex. 20 (ex. A)). The letter stated that while "We did not believe that the wording in our agreement with your International Union was in violation of the National Labor Relations Act", a contrary

[1] Blanket application of the refund remedy was subsequently invalidated by this Court in *Local 60, Carpenters* v. *N.L.R.B.*, 365 U.S. 651.

opinion had been expressed by the Nineteenth Region of the National Labor Relations Board, and accordingly "we find it necessary to terminate this agreement as of this date" (*ibid.*) The letter invited entry into a new agreement in conformity with the National Labor Relations Act (*ibid.*). Termination of the old agreement was prompted by the General Counsel's warning of application of the refund remedy (G.C. ex. 8, pp. 21-22). In reply, the president of United Brotherhood wrote that, upon receipt of the General Counsel's "directive," counsel had been assigned "to make recommendations on the necessary changes required in our International Agreement", and upon completion of an approved revision copies would be distributed to all contracting firms (G.C. ex. 20 (ex. B)). Thereafter, on August 20, 1958; the new agreement was executed, United Brotherhood expressing its confidence that it "fully satisfies the requirements of the law . . ." (R. 75, G.C. ex. 20 (exs. E-2, F, G)).

On April 30, 1959, more than eight months after the new agreement had been entered into and the old agreement had in consequence been definitively terminated, the General Counsel issued a complaint alleging in part that during its former continuance the old agreement had invalidly restricted employment to union members (R. 6-13). On February 16, 1961, more than 21 months after issuance of the complaint, the Board found that United Brotherhood had maintained a "closed shop contract with the Company during the period in question" in violation of Section 8(b)(2) and (1)(A) of the Act (R. 113, *infra*, p. 44a). The Board also found that another agreement, which had been terminated one year before the complaint had issued (R. 79, 115, *infra*, pp. 17a, 47a), to which United

Brotherhood, Montana State Council of United Brotherhood, Billings Local 1172, and a state-wide employer group were parties, was invalid because during its former continuance it had established a hiring hall but "contained none of the hiring hall safeguard provisions set out by the Board in *Mountain Pacific* [119 NLRB 883]." (R. 115, 113, *infra*, pp. 47a, 44a).

Thereafter, on April 17, 1961, this Court disapproved the rule of *Mountain Pacific*, holding that compulsory incorporation of protective provisions in a hiring hall agreement was "a legislative Act" beyond the Board's power to impose. *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667. Five months later, on September 26, 1961, by reason of this Court's intervening decision, the Board dismissed the complaint "insofar as it alleges the existence of an unlawful hiring hall arrangement and practice" (R. 123, *infra*, p. 57a), but reaffirmed its decision "having to do with the illegal closed shop contract existing between the Company and the Respondent Brotherhood . . . , and the remedy already ordered in that connection" (R. 122, *infra*, p. 55a). Accordingly, the Board ordered United Brotherhood (1) to cease from executing, performing, maintaining or otherwise giving effect to provisions of any agreement or understanding with the Company, or with any other employer, which conditions employment on union membership except as permitted by law, and from engaging in any like or related activity; (2) to post notices to that effect at its offices, and, the Company willing, at places where Company notices are customarily posted; and (3) *to publish the notice "in its official publications of general circulation among members . . . in the next succeeding issue of publications normally issued by it and distributed among its*

membership" (R. 122-123, *infra*, pp. 56a-57a, emphasis supplied). In dissent, Member Gerald A. Brown observed that (R. 122, n. 3, *infra*, p. 55a):

> Member Brown would dismiss the entire case for the following reasons: The Supreme Court's aforementioned decision has removed the principal theory upon which this case was tried, and the only remaining aspect of the original case concerns the alleged invalidity of a contract which was superseded in or before August 1958 during the "moratorium" period mentioned by the Trial Examiner. There is no showing of individual discrimination during the operative period of the contract, nor is there any claim of discrimination since the contract was superseded. Upon consideration of these circumstances, and wholly apart from reservations that the disputed contract is unlawful (see Member Murdock's dissenting opinion in *Marley Company*, 117 NLRB 107, 119-122), Member Brown considers further proceedings unwarranted.

The court below enforced the Board's order, specifically approving the requirement that United Brotherhood publish a notice of the order at least once in its publication generally distributed to its members (*infra*, pp. 9a-10a).

REASONS FOR GRANTING THE WRIT

This is another in the continuing series of cases in which it is necessary for this Court to recall to the Board the limitations upon its authority and discretion in its exercise of remedial power.[2] In this case the

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[2] *E.g., Local 60, Carpenters* v. *N.L.R.B.*, 365 U.S. 651; *Communications Workers* v. *N.L.R.B.*, 362 U.S. 479; *N.L.R.B.* v. *District 50, UMW*, 355 U.S. 453; *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426; *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7; *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 236.

excess pertains to the requirement that United Brotherhood publish once in its monthly journal distributed to its members notice that "WE WILL NOT enter into, maintain or enforce any contract, agreement, understanding, or practice with THE REFINERY ENGINEERING COMPANY, or any other employer . . . , which unlawfully conditions" employment on union membership, or engage in any like or related activity (*infra*, pp. 58a-59a).

The purpose of notice is to convey to the employees assurance that they will be free in the future from the kind of past activity found by the Board to be unlawful.[3] Overwhelmingly, dissemination takes the form of, and is sufficiently served by, posting notices in conspicuous places, including all places where notices to employees are customarily displayed, in the locale where the unfair labor practice occurred. Infrequently notice-posting is supplemented by requiring publication in a newspaper. Sometimes justification lacks for any notice at all.[4] In this, as in other areas where the Board orders desistance or affirmative action, the Board's power "is contained by the requirement that the remedy shall be 'appropriate' . . . , and shall be adapted to the situation which calls for redress' . . . ."[5] In this case, the Board oversteps the limitation upon its power, because publication of the notice in the monthly journal is not only totally unnecessary but positively harmful; it serves punitive, not remedial, purposes.

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[3] *N.L.R.B. v. Falk Corp.*, 308 U.S. 453, 462; *Art Metals Construction Co. v. N.L.R.B.*, 110 F.2d 148, 151 (C.A. 2).

[4] *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226.

[5] *N.L.R.B. v. District 50, UMW*, 355 U.S. 453, 458.

1. United Brotherhood's official monthly journal, *The Carpenter* (R. 73, Sec. 44A, p. 36), has a nationwide circulation among the approximately 750,000 members to whom it is distributed.[6] The Board thus requires nationwide publication of the notice. Yet the unfair labor practice upon which so pervasive a disclaimer is enjoined ceased to exist at least eight months before the complaint even issued (*supra*, p. 5). And the Board's order compelling publication was not finalized until more than three years after the event to which it was addressed had passed into history (*supra*, p. 6). It is now more than five years.

Not only is the publication order based on an unfair labor practice which is stale, the act had ceased in circumstances where its termination had in fact been broadly and contemporaneously heralded. It had been ended as part of the General Counsel's "widely publicized" drive to coerce compliance with union security and hiring arrangements deemed valid by the agency; in the words of the Company's Industrial Relations Director, "we, like everyone in the construction industry, were cognizant of the opinion handed down by the then General Counsel . . ." (*supra*, p. 4). Thus, if any publicity were necessary to give assurance to the employees against a closed shop, such assurance had been prominently, contemporaneously, and vehemently conveyed. The Board's belated requirement of nationwide publication in the monthly journal ignites in comparison a pale spark long after the rocket had glaringly burst.

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[6] The membership is reported as 800,000 in Directory of National and International Labor Unions in the United States, 1961, Bull. No. 1320, Dept. of Lab., Bur. Lab. Stat., 17 (1962).

Finally, it is union members among whom the journal circulates, and the premise of publishing the notice in the magazine distributed to them is necessarily that the unfair labor practice exerted an effect upon them which needs to be dispelled. In the building and construction industry this premise is fanciful. Long-standing and voluntary union membership is traditional in the industry. Union membership is indeed so natural an attribute of the craftsman in the building trades that what would be unnatural to him would be the thought of relinquishing it. And the union member would regard a system of employment based on membership as a service to him rather than coercive of him. Thus, to require publication of a notice in a magazine circulated among this class of union members exclusively, a class "[w]here no membership in the union was shown to be influenced or compelled by reason of any unfair practice" (*Local 60, Carpenters* v. *N.L.R.B.*, 365 U.S. 651, 655), is to seek to dispel what was never instilled by the wrong found by the Board. In a word, "no 'dissipation' of the effects of the prohibited action is achieved." *Ibid.*

In sum, the publication order is based on an antiquated event; the event ended in circumstances of widespread contemporaneous publicity; and virtually none of the union members among whom the journal circulates felt any effect which requires dissipation. In these circumstances, there is "little, if any, need for orders requiring . . . the posting of any notices" (*N.L.R.B.* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226); and whatever need does exist is fully satisfied by the uncontested requirement that United Brotherhood post notices "in all places where notices to members are customarily displayed in its offices," as

well as by posting; the Company willing, in places where notices to the Company's employees are customarily posted (*infra*, pp. 2a-3a). The additional requirement of nationwide publication of the notice in the journal bears no genuine relation to a realistic need or capacity to dissipate any palpable effect of the stale and finished unfair labor practice. The requirement can only be explained by a wish to make petitioner smart for having ever engaged in the act, and to compel a public proclamation of *mea culpa*. What the Board would thus compel, and the court below permit, is foreign to "too long a history, and too dearly bought privileges," to allow. L. Hand, J., in *Art Metals Construction Co.* v. *N.L.R.B.*, 110 F.2d 148, 151 (C.A. 2). "The order in those circumstances becomes punitive and beyond the power of the Board." *Local 60; Carpenters* v. *N.L.R.B.*, 365 U.S. 651, 655.

2. Citing three cases to show like activity, the court below stated that the conduct here was "not an isolated instance of this type" but had happened "on several occasions," and on this basis justified publication in the journal (*infra*, p. 10a). But, from the 1947 amendments of the Act creating unfair labor practices by unions through the Board's final decision in this case, fourteen years had elapsed. To show three previous instances of like conduct in the space of fourteen years is to demonstrate, not proclivity to wrong, but absence of significant manifestation of it. And particularized analysis of the three previous instances confirms the lack of any meaningful incidence of misconduct. In *Marley Co.*,[7] the Board by a divided vote held for the first time that the prototype of the international agreement present in this case was invalid. The agreement,

[7] 117 NLRB 107.

however, was not found to be invalid on its face (117 NLRB at 129); rather, by incorporating "the rules and regulations established or agreed upon by the . . . [local union] of the locality," the agreement was found invalid solely to the extent that the local rules it adopted happened to be invalid (*id.* at 108-109). In *Mechanical Handling Systems*,[8] United Brotherhood filed no exceptions to the finding that its international agreement was illegal by virtue of incorporation of invalid local rules,[9] thus acquiescing in the Board's decision in *Marley*. In the third case, *Millwrights Local 2232*,[10] there was no international agreement in the picture at all. Thus, of the three cases, one adjudicated the invalidity of the international agreement, the second showed acquiescence in the determination, and the third is irrelevant. This hardly adds up to a showing even plausibly sufficient to require circulation of a disclaimer among 750,000 members.

3. Not only is publication in the journal quite pointless, it is positively harmful. Although meant for workers' eyes, the notice is written by lawyers in the language of lawyers, and the qualifications in it which may be clear enough to the lawyer are altogether lost on the worker. And so the carpenter who reads the notice can be expected to believe that the notice pertains to a current state of affairs and that there is hence something wrong with the agreement under which he is presently working. He is hardly equal to

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[8] 122 NLRB 396, enforced, 273 F.2d 699 (C.A. 7), reversed as to the refund provision of the order, 365 U.S. 651.

[9] *Id.* at 399.

[10] 122 NLRB 300, enforced as modified, 277 F.2d 217 (C.A. 5), cert. denied, 366 U.S. 908.

the "'feat of mental pole vaulting'" [11] necessary to relate a notice published in 1963 to a defunct agreement definitively superseded in 1958. As a result, based on his natural belief that the notice has contemporary significance rather than being a lesson in ancient history, the worker will be assaulted by doubts concerning perfectly lawful current agreements, and will require assurance, not that his rights under the law will be respected, but that his rights under the agreement are intact. It effectuates no policy of the Act to create confusion and unrest among 750,000 members based on a dead agreement.

4. It is easy to say, as doubtless the Board will say, that the petition puts into issue the rightness of a particular decision but presents no question of general importance. But that is too easy. The circumstances under which a labor organization can be required to circulate a notice among its entire membership is a question of general importance in the administration of the Act. While it is too much to say that the Board can never require it, surely the situation must be very exceptional to allow it, and the function of this case is to fix the standard for governing this significant aspect of the Board's power. The case therefore merits this Court's consideration.

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[11] *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 481, n. 4.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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